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Houlton Citizens' Coalition v. Town of Houlton: Is an Open and Competitive Bidding Process Really the Solution to National Waste Disposal Problems

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**HOULTON CITIZENS' COALITION V. TOWN OF HOULTON:
IS AN "OPEN AND COMPETITIVE" BIDDING PROCESS
REALLY THE SOLUTION TO NATIONAL
WASTE DISPOSAL PROBLEMS?**

I. INTRODUCTION

The United States is the world's leading producer of garbage.¹ The United States produces approximately 222 million tons of municipal solid waste every year.² Municipalities throughout the country deposit most of this solid waste in landfills.³

However, municipalities are quickly depleting existing landfill space and are creating a "waste crisis".⁴ Eighty percent of landfills that operated in 1989 will fill to capacity and close by the year 2004.⁵ As these landfills close, no new waste disposal sites replace

1. See Sidney M. Wolf, *The Solid Waste Crisis: Flow Control and the Commerce Clause*, 39 SAN DIEGO L. REV. 529, 530 (1994) (stating, "Americans produce more garbage, both per person and in absolute amounts, than any other nation in the world").

2. See Robert R.M. Verchick, *Critical Space Theory: Keeping Local Geography in American and European Environmental Law*, 73 TUL. L. REV. 739, 750 (1999); see also *The Math: Behold the Universal Power of the Number*, For Him Magazine, Mar./Apr. 2000, at 54. The United States produces one-fifth of the world's garbage. See *id.* Individually, the average American generates 1,570 pounds of garbage per year. See *id.*

3. See James E. Breitenbucher, *Yakety Yak, Take Your Garbage Back: Do States Have Any Protection From Becoming The Dumping Grounds For Out-Of-State Municipal Solid Waste?*, 52 WASH. U.J. URB. & CONTEMP. L. 225, 225-26 (1997) (stating incineration and recycling are other disposal methods but majority of waste goes to landfill); see also *City of Philadelphia v. New Jersey*, 437 U.S. 617, 630 (1978) (Rehnquist, J., dissenting) (asserting environmental problems linked to incineration has led to decline in that method of waste disposal); *Public Ownership of Dumps is the Key*, *Rachel's Hazardous Waste News* # 232, March 8, 2000, available at <http://rachel.enviroweb.org/rhwn232.htm> (noting Americans bury 134 million tons of municipal solid waste in landfills every year).

4. See Jennifer M. Anglim, *The Need For A Rational State and Local Response to Carbon: Alternate Means to Responsible, Affordable Municipal Solid Waste Management*, 18 VA. ENVTL. L.J. 129, 130 (1999) (defining "waste crisis" as "a term commonly used to describe the vast quantity of garbage produced in the United States each year in the face of closing landfills"); Erik T. Koons, Note, *Without A Clue And Still Without A Master Plan: Municipalities Left Uncertain How To Manage Waste Disposal Crisis In Wake Of Third Circuit Decision In Harvey & Harvey, Inc. V. County of Chester*, 9 VILL. ENVTL. L.J. 225, 226 (1998).

5. See Koons, *supra* note 4, at 226. Congress has not provided state or municipal governments with the tools needed to address this "waste crisis" and as result, state and local governments have assumed the responsibility of instituting waste management programs and dealing with the financial burdens that come with it. See *id.* at 227-28.

them.⁶ Therefore, the supply of waste disposal sites will not meet the demand of increased amounts of municipal waste.⁷

One explanation for this crisis is that many communities do not want to deposit waste within their borders because of potential public health concerns.⁸ Landfills may leak hazardous substances into the soil or groundwater.⁹ Similarly, incinerators may emit toxins into the air.¹⁰

As a result, environmental concerns push many states to adopt stricter waste disposal regulations.¹¹ Sanctions imposed pursuant to these regulations have forced states to close many landfills and have increased disposal rates.¹² The cost of constructing new disposal facilities to replace these closed sites can cost millions.¹³

Communities handle the high costs associated with waste disposal in different ways. Many communities ship their solid waste to landfills located in other states, but recipients of this outside waste

6. See *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, 504 U.S. 353, 368-69 (1992) (Rehnquist, C.J., dissenting). Chief Justice Rehnquist stated that the amount of solid waste is supposed to reach 216 million tons by the year 2000, or 4.4 pounds per person per day. See *id.* at 368 (citing Environmental Protection Agency (EPA), *Characterization of Municipal Solid Waste in the United States 1990 Update*, 1990 Update 10 (1990)). Chief Justice Rehnquist asserted that the capacity to dispose of solid waste has not grown to meet demand because of the "substantial risks attendant to waste sites make them extraordinarily unattractive neighbors." *Id.* at 369.

7. See *id.*

8. See Breitenbucher, *supra* note 3, at 226 (commenting that landfills are unpopular because they create problems for local communities, such as contamination of local groundwater and high financial costs due to stricter environmental regulations).

9. See Verchick, *supra* note 2, at 750-51 (stating that in addition to these potentially hazards of waste disposal sites "these facilities bring increased noise, odors, traffic, and other annoyances to surrounding communities"); see also Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, 98 Stat. 3226 (1984) (codified at 42 U.S.C. 6901 (1994)). "[I]nadequate and environmentally unsound practices for the disposal or use of solid waste have created greater amounts of air and water pollution and other problems for the environment and for health" 42 U.S.C. § 6901(b)(3).

10. See Verchick, *supra* note 2, at 750-51.

11. See *Harvey & Harvey, Inc. v. Town of Chester*, 68 F.3d 788, 791 (3d Cir. 1995).

12. See *id.*; William E. Ward, *EPA Adopts New Guidelines for Landfill Gas Emissions: An Additional Regulation Impacting Landfills Operating In Utah*, 17 J. LAND RESOURCES & ENVTL. L. 435, 440 (1997) (noting the number of landfills decreased from 20,000 to 6,000 between 1978 and 1988).

13. See Wolf, *supra* note 1, at 537 (stating construction and operation of new waste facilities is enormously expensive); see also Sidney M. Wolf, *Congressional Bailout of Flow Control: Saving the Burning Beast*, 7 VILL. ENVTL. L.J. 263, 267 (1996) (stating that "a state-of-the-art landfill can easily cost \$150 million to construct" while "[w]aste-to-energy incinerators cost from \$30 million to \$500 million to build").

often protest.¹⁴ Many of these recipient communities attempt to enact provisions that block or restrict waste importation.¹⁵ Courts, however, have struck down these provisions under the Constitution's dormant Commerce Clause.¹⁶

Other communities address the rising cost of waste disposal by increasing local municipal ownership in the waste disposal business.¹⁷ However, municipalities put themselves at risk by taking ownership in waste disposal sites.¹⁸ Financing for public projects such as these costs millions of dollars.¹⁹ As a result, many communities must incur a sizeable amount of debt.²⁰ To alleviate the fiscal

14. See Breitenbucher, *supra* note 3, at 227 (asserting waste disposal to other communities turns local problem into someone else's problem); Verchick, *supra* note 2, at 750 (stating fifteen million tons of waste is transported across state lines each year "and the trend appears to be rising dramatically"); see also Paul Schwartzman, *N.Y.C. Garbage A Mixed Bag*, DAILY NEWS (N.Y.), Jan. 25, 1999, at 19. Bruce Weisburn, a resident and chairman for the local board of trustees for the town of Waynesburg, Ohio, which is a recipient of New York City trash, stated that "enough is enough. We don't want anymore. . . [i]t smells like New York City here." *Id.*

15. See *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334 (1992) (involving state tax on importation of waste into Alabama); *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978) (involving state ban on imported waste).

16. See *id.*; see also *Oregon Waste Systems, Inc. v. Department of Envtl. Quality*, 511 U.S. 93 (1994) (holding surcharge on out of state waste unconstitutional under Commerce Clause); *Chemical Waste Management*, 504 U.S. 334 (holding additional fee of seventy-two dollars per ton on waste generated out of state violated Commerce Clause); *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, 504 U.S. 353 (1992) (holding Michigan solid waste management statute which prohibited private landfill operators from accepting solid waste from outside that operator's county as violation of Commerce Clause); *City of Philadelphia*, 437 U.S. at 618 (striking down New Jersey statute that "prohibits the importation of most 'solid or liquid waste which originated or was collected outside the territorial limits of the State . . .'" as violation of Commerce Clause).

17. See *Harvey & Harvey, Inc. v. County of Chester*, 68 F.3d 788, 791 (3d Cir. 1995). The court stated that prior to the Tax Reform Act of 1986, most waste disposal facilities were privately owned. See *id.* After the Tax Reform Act repealed many tax incentives and private costs increased due to increased environmental regulation, public ownership became necessary. See *id.*

18. See *id.*; see also Nelson Perez, *The Unconstitutionality of Waste Flow Control and the Environmental Justice Movement's Impact on Incinerators*, 22 RUTGERS COMP. & TECH. L.J. 587, 594 (1996) (asserting flow control ordinances are crucial to prevent debt service defaults of municipal bonds, since investors "rely on flow control guarantees when investing in capital intensive technology"). For a discussion of how a flow control ordinance works, see text accompanying *infra* notes 21-24.

19. See Koons, *supra* note 4, at 232-33 (stating municipalities have had to issue millions of dollars in bonds to finance waste facility construction).

20. See *id.*; Sidney M. Wolf, *Congressional Bailout of Flow Control: Saving the Burning Beast*, 7 VILL. ENVTL. L.J. 263, 272 (1996) (noting "vulnerable debts range from a \$17.9 million materials recovery facility in Springfield, Missouri, to \$46 million borrowed for a proposed sewage sludge composting facility in Burlington County, New Jersey, to \$180 million in bond borrowing for a waste-to-energy plant in Onondaga County, New York"); C.M.A. McCauliff, *The Environment Held In Trust For Future Generations or the Dormant Commerce Clause Held Hostage To The Invisible Hand*

risk related to constructing and managing waste disposal sites, many communities enact flow control ordinances that create a system to direct municipally-licensed haulers to haul garbage to certain county-designated landfills.²¹ Once at the landfill, haulers are charged a "tipping fee".²² A "tipping fee" is a monetary amount based upon the facility's construction cost and the estimated amount of deposited waste *per annum*.²³ By conditioning a haulers license on compliance with this system, a municipality can enable itself to cover the construction and operation costs of these facilities.²⁴ However, the United States Supreme Court and other circuit courts have consistently invalidated flow control ordinances which "deprive competitors, including out-of-state firms, of access to a local market" as unconstitutional violations of the dormant Commerce Clause.²⁵

This Casenote addresses the recent decision of the First Circuit Court of Appeals in *Houlton Citizens' Coalition v. Town of Houlton*,²⁶ in which the Court upheld the Town of Houlton's flow control ordinance against a dormant Commerce Clause attack. Part II discusses the facts of *Houlton*.²⁷ Part III provides a background of the dormant Commerce Clause and an analysis of various courts' inter-

Of The Market?, 40 VILL. L. REV. 645, 651 n.17 (1995) (noting that there is eighteen billion dollars of debt, including municipal bonds, invested in waste management field) (citing 140 Cong. Rec. H10, 307 (daily ed. Sept. 29, 1994)).

21. See *Harvey*, 68 F.3d at 792. A haulers' license is usually conditioned upon compliance with the flow control ordinance. See *id.*; see also Wolf, *supra* note 1, at 537. Wolf states that "without flow control measures these facilities would not have predictable volume nor would waste generating sources have predictable disposal capacity." *Id.*

22. See *Harvey*, 68 F.3d at 792.

23. See *id.*; *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 387 (financing newly built transfer station required minimum of 126,000 tons of waste per year and a "tipping fee" of eight-one dollars per ton). For a discussion of the facts and holding in *Carbone*, see *infra* notes 75-86 and accompanying text.

24. See *Harvey*, 68 F.3d at 792. The Third Circuit in *Harvey* noted that the waste disposal crisis led to higher tipping fees in years past because there was more demand than supply. See *id.* at f.4. However, the waste disposal market adjusted to this with an emergence of new entrants. See *id.* As a result, tipping fees fell. See *id.* Therefore, "flow control ordinances have been crucial to the financial viability of these facilities." *Id.*

25. *Carbone*, 511 U.S. at 386. For a discussion of *Carbone*, see *infra* notes 75-86 and accompanying text. See *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, 504 U.S. 353 (1992); *SSC Corp. v. Town of Smithtown*, 66 F.3d 502, 513-14 (2d Cir. 1995) (holding ordinance excluded in and out-of-state competitors thereby violating dormant Commerce Clause); *Ben Oehrleins and Sons and Daughter, Inc. v. Hennepin County*, 115 F.3d 1372, 1385 (holding ordinance giving preference to local interests violated Commerce Clause).

26. 175 F.3d 178, 181 (1st Cir. 1999).

27. For a discussion of the facts of *Houlton*, see *supra* notes 31-46 and accompanying text.

pretations of the clause.²⁸ Part IV includes both a narrative and critical analysis of the First Circuit's decision.²⁹ Finally, Part V attempts to gauge the impact that this decision will have on other cases throughout the judicial system.³⁰

II. FACTS

On October 17, 1995, state environmental authorities ordered the Town of Houlton (the Town) to close its dump.³¹ To remain compliant with state law, the Town conducted an open competitive bidding process by issuing a Request for Proposals (RFP).³² The Town selected a local firm, Andino, Inc. (Andino) as its exclusive waste management contractor.³³ The Town also enacted a flow-control ordinance (the 1995 Ordinance).³⁴ However, another trash disposal operator challenged the 1995 Ordinance in federal court.³⁵ To avoid litigation, the Town chose to enact a new ordinance (the 1997 Ordinance).³⁶

28. For a discussion of the background and interpretation of the dormant Commerce Clause, see *supra* notes 47-127 and accompanying text.

29. For a discussion of the narrative and critical analysis, see *supra* notes 128-90 and accompanying text.

30. For a discussion of *Houlton's* impact, see *supra* notes 191-209 and accompanying text.

31. See *Houlton*, 175 F.3d at 181.

32. See *id.*

33. See *id.* The Town agreed to provide Andino with a guaranteed trash quota for seven years. See *id.*

34. See *id.* The 1995 Ordinance "required all residential solid waste generated within the town limits to be taken to a local transfer site operated by Andino." *Id.*; see also HOULTON, MAINE, SOLID WASTE MANAGEMENT REGULATIONS, art. V, § 10-504 (1995). The 1995 Ordinance states:

the town or the contractor of the town shall designate any exclusive disposal site or sites for disposal of solid wastes generated within the boundaries of the town. The disposal of the solid waste generated within the town by any waste generator at any place other than at the disposal site(s) is prohibited.

Id.

35. See *Houlton*, 175 F.3d at 181. David Condon, a trash disposal operator, sued Andino and the Town "[a]sserting that the 1995 Ordinance violated the Commerce Clause" *Id.* A federal district court upon hearing the complaint preliminarily enjoined the 1995 Ordinance. See *id.*; see also *Condon v. Andino, Inc.*, 961 F.Supp. 323 (D. Me. 1997) (providing district court's full opinion).

36. See *Houlton*, 175 F.3d at 181. The 1997 Ordinance provided in pertinent part the following:

Town residents who do not use the residential refuse collection services of the Town or its franchisee or contractor shall dispose of their residential refuse at the disposal site designated by the Town Council. The disposal of residential refuse generated within the Town by any waste generator at any place other than at the disposal site designated by the Town Council is prohibited unless the refuse has been collected by the

The 1997 Ordinance has two components.³⁷ The first component “requires all generators of residential rubbish within the Town either to use Houlton’s chosen contractor to transport their trash, or to haul it themselves.”³⁸ Residents who choose to self-haul must take their refuse to a repository designated by the Town Council.³⁹ Those who fail to comply with the ordinance are subject to fines and penalties.⁴⁰ The second component, the Town’s new contract with Andino, gives Andino “the exclusive right to collect third-party residential waste under the 1997 Ordinance, and designat[es] its transfer station as the disposal site for self-haulers.”⁴¹

The Houlton Citizens’ Coalition (HCC),⁴² along with three other plaintiffs, brought suit in the United States District Court for the District of Maine to restrain the implementation of the 1997 Ordinance.⁴³ The district court granted summary judgment in favor of the Town on all claims.⁴⁴

HCC appealed to the First Circuit, arguing that the 1997 Ordinance violated the Commerce, Takings, and Contract Clauses of the United States Constitution.⁴⁵ After reviewing the case, the First

Town or its contractor, in which case it may be disposed of at any disposal site.

Houlton, MAINE, SOLID WASTE MANAGEMENT REGULATIONS, art. V, § 10-504 (1997).

37. See *Houlton*, 175 F.3d at 181.

38. *Id.*

39. See *id.* at 181-82. However, “the Town’s contractor is permitted to dispose of collected trash at any proper disposal site.” *Id.*

40. See *id.* at 182.

41. *Id.* The 1995 contract between Andino and the Town included a failsafe clause which stated that the Town would “agree to negotiate with Andino in good faith to keep it as the Town’s contractor if a court of competent jurisdiction held the 1995 Ordinance invalid or unenforceable.” *Id.*

42. The Houlton Citizens’ Coalition is an “unincorporated nonprofit association formed by Houlton residents.” *Id.* at 182.

43. See *Houlton*, 175 F.3d at 182. The other plaintiffs in the suit were David Condon and two other local trash haulers, William Faulkner and Fred Spellman. See *id.* Plaintiffs argued that the 1997 Ordinance violated the Commerce Clause, the Takings Clause, and the Contract Clause, in addition to state-law claims under the town charter. See *id.* In counts I, III, and IV, they alleged that the 1997 Ordinance violated their civil rights. See *Houlton Citizens’ Coalition v. Town of Houlton*, 11 F. Supp.2d 105, 106 (D. Me. 1998). Plaintiffs further alleged that the Town Charter was violated for failure to solicit bids and failure to notify the public prior to the announcement of the 1997 Contract. See *id.*

44. See *Houlton*, 175 F.3d at 182. The district court, in granting summary judgement, found that the plaintiffs “were unlikely to prevail on the merits.” *Id.*

45. See *id.* at 183 (stating that “[t]he appellants find four fatal flaws in the Town’s waste management scheme: (1) it insults the dormant Commerce Clause; (2) it takes property without just compensation; (3) it impermissibly burdens contracts; and (4) its implementation by the Town violates the municipal charter”) *Id.* The appellants also alleged that the Town violated its charter by not allowing for another round of sealed and competitive bidding when it renegotiated its contract

Circuit concluded that the 1997 Ordinance did not violate the Commerce, Takings, nor Contract Clauses and affirmed the lower court's ruling.⁴⁶

III. BACKGROUND

A. Brief History of the "Dormant" Commerce Clause

The Commerce Clause of the United States Constitution states that "the Congress shall have power . . . to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."⁴⁷ In the 1824 landmark case *Gibbons v. Ogden*,⁴⁸ the United States Supreme Court held that Congress has absolute authority to regulate matters which affect interstate commerce.⁴⁹ However, states may legislate in those areas which Congress does not have authority to control under the Constitution.⁵⁰ States thus therefore may regulate *intrastate* commerce, but their regulatory power has limits. The United States Supreme Court held in *Gibbons* that Congress also has the power to regulate *intrastate* commerce in situations where interstate commerce is ultimately affected.⁵¹ This

with Andino. *See id.* at 191. The district court held the renegotiated contract was valid. *See id.* at 192. However, the court of appeals concluded that the district court should have dismissed the supplemental law claim "without prejudice" because the scenario was so complex that a state court should make the ruling. *See id.*

46. *See id.* at 192.

47. U.S. CONST. art. I, §8, cl. 3.

48. 22 U.S. (9 Wheat.) 1 (1824).

49. *See id.* at 196-97. Chief Justice Marshall wrote:

If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States.

Id.

50. *See id.* The *Gibbons* Court explained that there are areas under the Constitution which Congress was not given the power to regulate, such as "[i]nspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a state, and those with respect to turnpikes, roads, ferries, etc." *Id.* The Court asserted that these areas were not surrendered by the states to the federal government and that state regulation would be "most advantageously exercised by the states themselves." *Id.*; *see also* South Carolina State Highway Dept. v. Barnwell Bros., Inc., 303 U.S. 177, 185 (1938) (indicating lack of federal legislation in many areas escape attention of Congress "because of their local character and their number and diversity").

51. *See Gibbons*, 22 U.S. (9 Wheat.) 1 at 194-95. Chief Justice Marshall held that Congress does not have the power under the Constitution to regulate commerce "completely within a particular State, which do not affect other States". *Id.* Therefore, "[t]he completely internal commerce of a State, then, may be considered as reserved for the State itself." *Id.*

power, though not explicitly stated in the Constitution, is known as the dormant Commerce Clause.⁵² It assumes the nation as a whole is one common market “in which state lines cannot be made barriers to the free flow of both raw materials and finished goods in response to the economic laws of supply and demand.”⁵³ This clause prevents economic isolationism between the states by barring regulations that benefit in-state economic interests at the expense of out-of-state competitors.⁵⁴

B. Challenging An Ordinance Under the “Dormant” Commerce Clause

When a party challenges an ordinance as a violation of the dormant Commerce Clause, a court must first “determine whether. . . [the challenged ordinance] ‘regulates evenhandedly with only incidental effects on interstate commerce, or discriminates against interstate commerce.’”⁵⁵ Discrimination occurs when an ordinance favors in-state economic interests at the expense of out-of-state interests.⁵⁶ Furthermore, an “ordinance is no less discriminatory because in-state or in-town [interests] are also covered by the prohibition.”⁵⁷

An ordinance can be discriminatory on its face in either purpose or effect. If the purpose of the ordinance is discriminatory on

52. See *Wilson v. Black Bird Creek Marsh Co.*, 27 U.S. 245, 252 (1829). The Supreme Court addressed the issue of whether a state act which gave Black Bird the right to build a dam across a creek violated the commerce clause. See *id.* at 251. The Court held that since Congress had not passed any act regulating small navigable creeks, the act was not “repugnant to the power to regulate commerce in its dormant state”. *Id.* at 252.

53. *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 803 (1976).

54. See *Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564, 578 (1997) (stating that “[b]y encouraging economic isolationism, prohibitions on out-of-state access to in-state resources serve the very evil that the dormant Commerce Clause was designed to prevent”); *New Energy Company of Indiana v. Limbach*, 486 U.S. 269, 273 (1988) (stating Commerce Clause prohibits economic protectionism if state discriminates against interstate commerce); see also *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525 (1949). Justice Jackson wrote “[t]his principle that our economic unit is the Nation, which alone has the gamut of powers necessary to control of the economy, including the vital power of erecting customs barriers against foreign competition, has as its corollary that the states are not separable economic units.” *Id.* at 537-38.

55. *Oregon Waste Systems, Inc. v. Dep’t of Environmental Quality*, 511 U.S. 93, 99 (1994) (quoting *Hughes v. Oklahoma*, 411 U.S. 322, 336 (1979)).

56. See *id.*

57. *C & A Carbone v. Town of Clarkstown*, 511 U.S. 383, 391 (1994); *Dean Milk Co. v. Madison*, 340 U.S. 349, 354 (1951). For a discussion of *Dean Milk*, see *infra* note 67.

its face, then the ordinance is *per se* unconstitutional.⁵⁸ If, however, the purpose of the ordinance is neutral on its face, the ordinance may still be unconstitutional if a court finds the ordinance discriminatory in its effect.⁵⁹ To overcome the discriminatory burden of proof, a "municipality can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest."⁶⁰ In most cases, courts have been hard pressed to find a legitimate local interest, although some have been found.⁶¹

If a court finds the ordinance nondiscriminatory in its purpose and effect, then the ordinance enjoys a certain presumption of constitutionality.⁶² But the analysis is not complete. A court will next

58. See *Carbone*, 511 U.S. at 392 (stating that "[d]iscrimination against interstate commerce in favor of local business or investment is *per se* invalid"); *Fort Gratiot Sanitary v. Michigan Dep't of Natural Resources*, 504 U.S. 353, 359 (1992) (citing *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 274 (1988)) (stating, "[a] state statute that clearly discriminates against interstate commerce is therefore unconstitutional"); *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978) (stating that "where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected").

59. See *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977). *Hunt* held unconstitutional a North Carolina law preventing the labeling of North Carolina apples. See *id.* The Court found that even though the law was neutral on its face, the law's effect discriminated against Washington apple growers in favor of local producers. See *id.* at 349-53. Since the State was unable to prove legitimate local needs and the absence of nondiscriminatory alternatives, the law was invalid. See *id.* at 354.

60. See *Carbone*, 511 U.S. at 392; See *Oregon Waste Systems*, 511 U.S. at 101 (quoting *Hughes v. Oklahoma*, 411 U.S. 322, 337 (1979)) (stating, "[t]he State's burden of justification is so heavy that 'facial discrimination by itself may be a fatal defect'"); *Maine v. Taylor*, 477 U.S. 131, 138 (1986) (citing *Hughes*, 411 U.S. at 322) (commenting if "a state law is shown to discriminate against interstate commerce 'either on its face or in practical effect,' the burden falls on the State to demonstrate both that the statute 'serves a legitimate local purpose,' and that this purpose could not be served as well by available nondiscriminatory means").

61. See *Maine v. Taylor*, 477 U.S. 131, 148 (1986) (holding State of Maine has legitimate interest in banning importation of baitfish due to imperfectly understood environmental risks); *Sporhase v. Nebraska*, 458 U.S. 941, 955 (1982) (stating that "there are legitimate reasons for the special treatment accorded requests to transport ground water across state lines"); *Asbell v. State of Kansas*, 209 U.S. 251 (holding restriction of diseased cattle into state of Kansas was not in violation of Commerce Clause because healthy cattle were admitted). But see *Hughes v. Oklahoma*, 411 U.S. 322 (1979). In *Hughes*, an Oklahoma law prohibited the transfer of Oklahoma minnows outside of the state was challenged. See *id.* at 323, n.1. The Supreme Court held the law unconstitutional because Oklahoma failed to try nondiscriminatory alternatives that could have achieved the same legitimate local purpose. See *id.* at 337-38. Justice Brennan stated that the law "is certainly not a 'last ditch' attempt at conservation after nondiscriminatory alternatives have proved unfeasible. It is rather a choice of the most discriminatory means even though nondiscriminatory alternatives would seem likely to fulfill the State's purported legitimate local purpose more effectively." *Id.* at 338.

62. See *Maharg, Inc. v. Van Wert Solid Waste Management Dist.*, No. 3:99CV7245, 1999 U.S. Dist. LEXIS 13182, at *9 (N.D. Ohio Aug. 6, 1999).

apply the balancing test set forth in *Pike v. Bruce Church, Inc.*⁶³ The *Pike* court held that an ordinance is invalid if “the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.”⁶⁴ A court must weigh the burden imposed on interstate commerce against any legitimate local purposes the state advances.⁶⁵

To determine whether a state has advanced a legitimate local purpose, the court must consider the local interest served by the ordinance.⁶⁶ Furthermore, the court must determine whether the state could obtain the same result through an alternative adequate means which may have a lesser impact upon interstate commerce.⁶⁷ It is the challenging party that carries the burden of proof. As such, if the challenging party can prove that a less detrimental adequate mean exists, then the ordinance will not be upheld.⁶⁸

C. Judicial Interpretation of the Commerce Clause in Relation to Flow Control Ordinances

Courts employ three methods of analysis in determining the constitutionality of a flow control ordinance. The first method is to use traditional dormant Commerce Clause analysis.⁶⁹ The second method is to determine if the local government is acting as a “market participant” or a “market regulator.”⁷⁰ Dormant Commerce Clause analysis applies only if the government is acting as a market

63. 397 U.S. 137 (1970).

64. *Id.* at 142. If the court determines that there are legitimate local interests that cannot be served by any other means, then the court will hold the ordinance constitutional. *See id.*

65. *See id.*

66. *See id.*

67. *See id.*; *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951). In *Dean Milk*, the City of Madison, Wisconsin passed a regulation that made it unlawful to sell any milk which had not been processed within 5 miles of the city. *See id.* at 350. *Dean Milk Co.*, an Illinois corporation that distributed milk in both Illinois and Wisconsin, filed suit alleging that the ordinance burdened interstate commerce. *See id.* at 351. The city responded by arguing that the regulation was not designed to discriminate against out-of-state milk producers, but rather to allow inspectors to assure the quality of the milk being consumed in Madison. *See id.* The Supreme Court disagreed, holding that even if the intent of the regulation was health and safety, there were reasonable non-discriminatory alternatives available. *See id.* at 352-57. For example, the city could have sent its inspectors out to individual plants to monitor milk production and passed that cost along to the importing producers and processors. *See id.* at 354-55.

68. *See Pike*, 397 U.S. at 142.

69. For a discussion of the traditional dormant Commerce Clause approach, see text accompanying *supra* notes 55-68.

70. For a discussion of the market participation analysis, see text accompanying *supra* notes 87-93.

regulator.⁷¹ A market participant is exempt from dormant Commerce Clause analysis.⁷² The third method is to look to the bidding process the local government used in choosing the waste hauler.⁷³ If the court finds the bidding process to be "open and competitive," then there is no dormant Commerce Clause violation.⁷⁴

1. *Traditional "Dormant" Commerce Clause Analysis*

The first method courts employ to determine the constitutionality of an ordinance under the dormant Commerce Clause is the traditional method. In *C & A Carbone, Inc. v. Town of Clarkstown*,⁷⁵ the Supreme Court determined whether a local flow control ordinance violated the dormant Commerce Clause.⁷⁶ In *Carbone*, the Town of Clarkstown (Clarkstown) constructed a new transfer station and hired a private contractor to manage it.⁷⁷ In order to amortize the cost of the facility, Clarkstown passed a flow control ordinance which required all solid waste to be processed at its designated transfer station.⁷⁸ The ordinance therefore guaranteed Clarkstown a minimum amount of waste that would pass through its designated facility and ensured a steady stream of income through "tipping fees."⁷⁹

C & A Carbone, Inc.(Carbone) brought suit in the United States District Court for the Southern District of New York claiming

71. See *United Bldg. & Constr. Trades Council of Camden Cty. & Vicinity v. Mayor and Council of the City of Camden*, 465 U.S. 208, 219-21 (1984); *Salem Blue Collar Workers Assn. v. City of Salem*, 832 F.Supp. 852, 858 (D. N.J. 1993).

72. See *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 809-10 (1976); *Red River Serv. Corp. v. City of Minot*, 146 F.3d 583, 586 (1998).

73. For a discussion of an "open and competitive" analysis of dormant Commerce Clause issue, see *infra* notes 121-25 and accompanying text.

74. See *Houlton*, 175 F.3d 178, 189 (1st Cir. 1999) (stating "this open and freely accessible bidding process ensured a level playing field for all interested parties and provided sufficiently broad market access to quell Commerce Clause concerns"); see also *Harvey & Harvey*, 68 F.3d 788, 802 (3rd Cir. 1995) (asserting that "a local authority could choose a single provider—without impermissibly discriminating against inter-state commerce—so long as the selection process was open and competitive and offered truly equal opportunities to in- and out-of-state businesses").

75. 511 U.S. 383 (1994).

76. See *id.* at 389.

77. See *id.* at 386. A local private contractor constructed the new transfer station for \$1.4 million dollars. See *id.* The contractor also agreed to operate the facility for a period of five years, upon which time Clarkstown would purchase the facility for one dollar. See *id.*

78. See *id.* at 386.

79. See *id.* at 387. In the contract with the private contractor, Clarkstown guaranteed a minimum of 120,000 tons per year, with a tipping fee of eighty-one dollars per ton. See *id.* If Clarkstown could not provide the minimum, then it agreed to provide the contractor with the difference. See *id.*

that the flow control ordinance violated the dormant Commerce Clause because the ordinance forced Carbone to ship its non-recyclable residue to Clarkstown's transfer station.⁸⁰ The Supreme Court agreed with Carbone and concluded that the ordinance discriminated against interstate commerce.⁸¹ It reasoned that forcing Carbone and others to use Clarkstown's transfer station led to increased costs for out-of-state interests and deprived those interests access to a local market.⁸² The Court also rejected Clarkstown's argument that the ordinance advanced legitimate local interests, such as protecting public health and the environment.⁸³ The Court focused on Clarkstown's admission that it passed the ordinance to increase financing and generate revenue.⁸⁴ The Court found the ordinance discriminatory in effect because it substantially affected the economics of interstate commerce.⁸⁵ The Court stated it accordingly could not apply the Pike test.⁸⁶

2. "Market Participation" v. "Market Regulator" Analysis

The second method courts may employ to determine the constitutionality of an ordinance under the dormant Commerce Clause is the market participant doctrine. In *Hughes v. Alexandria Scrap Corp.*,⁸⁷ the United States Supreme Court set forth the market par-

80. See *C & A Carbone, Inc.*, 511 U.S. at 388. C & A Carbone, Inc. is a processor of solid waste. See *id.* at 387. The company has a recycling facility in Clarkstown. See *id.* at 387-88. At this location the company sorts and bales the bulk solid waste that it receives and transfers it to other facilities to be further processed. See *id.*

81. See *id.* at 394-5 Clarkstown argued that the ordinance was nondiscriminatory "because it does not differentiate solid waste on the basis of its geographic origin" and that it bans local, as well as out-of-state, operators. *Id.* at 390. The Supreme Court disagreed, stating that the process of processing and disposal is covered under the Commerce Clause in this case and that "[t]he ordinance is no less discriminatory because in-state or in-town processors are also covered by the prohibition." *Id.* at 391.

82. See *id.*

83. See *id.* at 392-93. Amicae briefs asserted that local flow control ordinances, in the face of diminishing land fill space and rising environmental cleanup costs, are necessary to provide safe treatment of solid waste. See *id.*

84. See *id.* at 393-94 (stating that "[b]y itself, of course, revenue generation is not a local interest that can justify discrimination against interstate commerce. Otherwise States could impose discriminatory taxes against solid waste originating outside the State").

85. See *C & A Carbone, Inc.*, 511 U.S. at 389 (requiring Carbone to send out-of-state non-recyclable waste to Route 303 transfer station elevates price for out-of-state interests in waste disposal).

86. See *id.* at 390 (stating, "[a]s we find that the ordinance discriminates against interstate commerce, we need not resort to the *Pike* test") (emphasis in original).

87. See 426 U.S. 794 (1976).

ticipant test.⁸⁸ The Supreme Court held that dormant Commerce Clause analysis does not apply if a local government acts as a “market participant”, stating that “[n]othing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others.”⁸⁹ To be considered a “market participant,” a court must decide if “a private party could have engaged in the same actions.”⁹⁰ A private party, for example, may not take any action that evokes criminal sanctions.⁹¹ The “market participant” doctrine also limits the governmental burden on commerce to the particular market in which the state is participating.⁹² Therefore, a state-imposed condition which has a substantial

88. *See id.*

89. *See id.* at 810. A Maryland statute provided bounties to scrap processors in order to alleviate the growing problem of abandoned automobiles. *See id.* at 796-97. In order to receive the bounty, scrap processors had to submit documentation required by the state. *See id.* at 798. The legislature, however, amended the law, forcing out-of-state processors to submit more burdensome documentation. *See id.* at 801. The Supreme Court held the law constitutional, stating that Maryland was neither attempting to prohibit the flow of hulks nor trying to regulate their occurrence. *See id.* at 806; *see SSC Corp.*, 66 F.3d at 510 (noting that “[t]he Maryland program affected the market no differently than if Maryland were a private company bidding up the price of auto hulks”).

90. *See SSC Corp.*, 66 F.3d at 510 (citing *Wyoming v. Oklahoma*, 502 U.S. 437 (1992) (striking down Wyoming statute that required all in-state electrical utilities to fuel power plants with Oklahoma-mined coal holding local purchasing requirement for private businesses invalid because private business could not have done same)).

91. *See id.* (stating criminal sanctions for failure to follow flow control ordinances qualifies town as market regulator and not market participant); *Washington State Bldg. & Constr. Trades v. Spellman*, 684 F.2d 627, 631 (9th Cir. 1982) (noting that market participation exception did not apply to program that “establishes civil and criminal penalties which only a state and not a mere proprietor [could] enforce”).

92. *See South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 98 (1984). The State of Alaska proposed to sell state owned timber. *See id.* at 84. A potential buyer however, was required to partially process the state owned timber prior to its exportation. *See id.* South Central Timber, an Alaska corporation which had no processing facilities in Alaska, brought suit for an injunction, claiming the in-state processing requirement violated the Commerce Clause. *See id.* at 85-6. The State of Alaska responded that the requirement was within the “market participant” exception “arguing that ‘Alaska’s entry into the market may be viewed as precisely the same type of subsidy to local interests that the Court found unobjectionable in *Alexandria Scrap*.’” *Id.* at 95 (citing Brief for Respondents at 24). The Supreme Court, however, distinguished *Alexandria Scrap*. *See id.* The Court held that in *Alexandria Scrap*, the State of Maryland was merely subsidizing the market for the removal of hulks and therefore a dealer was free to process the hulk wherever it saw fit, possibly out-of-state and bypassing the advantages of the subsidy. *See id.* Whereas, “[u]nder the Alaska requirement . . . the choice is made for him: if he buys timber from the State he is not free to take the timber out of state prior to processing.” *Id.* The Court wrote that the “market participant” doctrine “is not *carte blanche* to impose any conditions that the State has the economic power to

regulatory effect upon a broader market will not qualify under the "market participant" exception.⁹³

In *SSC Corp. v. Town of Smithtown*,⁹⁴ the Second Circuit Court of Appeals determined whether Smithtown acted as a "market participant" or a "market regulator."⁹⁵ In *Smithtown*, Smithtown had entered into an agreement with the neighboring town of Huntington, whereby Smithtown would share its landfill in exchange for use of Huntington's proposed incinerator (hereafter known as the Huntington incinerator).⁹⁶ To guarantee the "tipping fees" necessary to finance the Huntington incinerator, Smithtown enacted a flow control ordinance that restricted disposal of all acceptable waste to the Huntington incinerator.⁹⁷ Smithtown also entered into a waste collection contract with SSC Corp. designating the Huntington incinerator as the only facility for the disposal of residential and commercial garbage.⁹⁸

dictate, and does not validate any requirement merely because the State imposes it upon someone with whom it is in contractual privity." *Id.* at 97. Therefore, the Court concluded that the "market participant" doctrine is limited only to a narrow market in which the state participates and goes no further. *See id.* at 97-8.

93. *See id.* at 99. The Supreme Court of the United States noted that broader market (i.e. downstream) regulations have a greater regulatory effect than limitations imposed on an immediate transaction. *See id.* The Court was concerned for two reasons. First, downstream regulation would allow for states to regulate the economic relationships between trading partners instead of the purchasing activity itself. *See id.* Second, the restriction occurs after the parties have performed their contractual duties "rather than during the course of an ongoing commercial relationship". *Id.* However, Justice White wrote in a footnote:

This is not to say that the State could evade the reasoning of this opinion by merely including a provision in its contract that title does not pass until the processing is complete. It is the substance of the transaction, rather than the label attached to it, that governs Commerce Clause analysis.

Id. at n.7.

94. 66 F.3d 502 (2d Cir. 1995).

95. *See id.* at 506.

96. *See id.* at 506. Ogden Martin Systems was to build the incinerator and the New York State Environmental Facilities Corporation was to finance it through the issuance of tax-free bonds. *See id.* at 506.

97. *See id.* at 507. Smithtown would rely upon ad valorem property taxes and tipping fees at the incinerator to secure payment on the tax-free bonds. *See id.* Consequently, Smithtown enacted the flow control ordinance to ensure that a certain amount of waste would be processed each year, thereby generating a guaranteed amount of tipping fees. *See id.*

98. *See id.* at 507. Smithtown divided itself into ten "improvement" districts and solicited open bids from waste service contractors. *See id.* Smithtown also made prospective bidders alert to the fact that they would have to sign an "Improvement Contract" if they were chosen. *See id.* The contract stated that each company would be required to dispose of their residential garbage at the incinerator. *See id.* Therefore, each company had to figure into their proposals the sixty-five dollars a ton tipping fee that would be charged at the incinerator, as well as the amount of

SSC Corp. brought suit against Smithtown in federal court, claiming that the contract and the ordinance violated the dormant Commerce Clause.⁹⁹ SSC Corp. argued that the dormant Commerce Clause should apply because Smithtown acted as a market regulator because it exercised its powers of civil and criminal enforcement.¹⁰⁰ Smithtown responded that the dormant Commerce Clause did not apply because it was a “market participant.”¹⁰¹ Smithtown claimed “market participant” status because it “placed substantial public funds at risk by assuming extensive financial obligations” and it merely “protect[ed] the town’s financial investment in the incinerator.”¹⁰² The Second Circuit disagreed, holding that Smithtown was not a “market participant” because the town threatened noncompliance with criminal fines and jail terms.¹⁰³

expected garbage from each district. *See id.* SSC won seven of the ten residential contracts. *See id.*

99. *See SSC Corp.*, 66 F.3d at 508. SSC charged Smithtown \$218 per household. *See id.* This number was derived from the sixty-five dollar per ton “tipping fee” charged at the incinerator added to the estimated \$126 dollar per house charge for collection services. *See id.* The \$218 dollars was then assessed to each resident’s property tax bill. *See id.* Two years later, Smithtown accused SSC of disposing Smithtown residential waste at other facilities which charged less than the sixty-five dollar “tipping fee” at Smithtown’s incinerator. *See id.* In doing so, Smithtown alleged that SSC was pocketing the difference. *See id.* Therefore, Smithtown decided to withhold more that \$750,000 in payments. *See id.* It is at this point that SSC brought its suit against Smithtown in federal court. *See id.*

100. *See id.* at 512.

101. *See id.*

102. *Id.* Smithtown argued that the language in South-Central Timber Development, Inc. v. Wunnicke, *supra* note 92, suggested “that Alaska’s local processing requirements would have been exempt from Commerce Clause scrutiny if the state had somehow participated in the processing market — for example, by owning a few timbermills.” *Id.* at 512. However, the court pointed out that this premise was explicitly refuted in Wyoming v. Oklahoma. *See id.* (citing Wyoming v. Oklahoma, 502 U.S. 473 (1992)). There, the United States Supreme Court held that although Wyoming was allowed to act as a “market participant” in the purchasing of local coal, it did not mean that all Wyoming’s actions constituted “market participation”. *Wyoming*, 502 U.S. at 454-59. Only those actions which a private party could have engaged in are considered “market participation.” *See id.* Smithtown also argued from Swin Resource Systems, Inc. v. Lycoming County, 883 F.2d 245 (3rd Cir. 1989). The Court of Appeals in *Swin* held that a local government could operate a landfill and be considered a “market participant.” *See id.* at 250. Smithtown argued that an incinerator, like a landfill, is essentially a “municipal facility” and therefore Smithtown deserved “market participant” status. *See SSC Corp.*, 66 F.3d at 513. The Second Circuit disagreed with Smithtown by distinguishing *Swin* from the present case. *See id.* In *Smithtown*, unlike *Swin*, there were criminal penalties for failure to comply with the flow control ordinance. *See id.* Since this forced business transactions, the court concluded that Smithtown was a “market regulator.” *See id.*

103. *See SSC Corp.*, 66 F.3d at 512. The penalty for violating the Smithtown “flow control ordinance is an unclassified misdemeanor, punishable by a fine of up to \$5,000 and up to 60 days’ imprisonment.” *See id.* at 507. For a discussion of the market participant doctrine, see *supra* notes 87-93 and accompanying text.

Having concluded that Smithtown was not a "market participant," the court accordingly applied *Carbone's* dormant Commerce Clause analysis to strike down the flow control ordinance as unconstitutional.¹⁰⁴

The Second Circuit, however, found constitutional the contract that designated the Huntington incinerator as the sole waste disposal facility.¹⁰⁵ The court found Smithtown to be a "market participant" in waste collection and disposal.¹⁰⁶ The court relied on the fact that Smithtown spent its own tax dollars to "contract out" a service that it could have performed on its own.¹⁰⁷ The court found that because Smithtown was a buyer and a consumer of collection and disposal services, it could mandate a location in SSC Corp.'s contract where SSC must dispose its waste.¹⁰⁸ Because it found

104. See *id.* at 513-14. Under *Carbone*, the Second Circuit found unconstitutional Smithtown's flow control ordinance because it facially discriminated against interstate commerce by channeling all Smithtown's garbage to the single incinerator. See *id.* at 514. As a result, both in-state and out-of-state waste disposal companies were excluded from participating in Smithtown's market for waste services. See *id.* This discriminatory result meant that Smithtown would have to prove a legitimate local interest that could not be achieved in any other way other than through the flow control ordinance. See *id.* The Second Circuit concluded that Smithtown failed in this regard, citing less discriminatory alternatives that were available in *Carbone*. See *id.* For example, if Smithtown's interest was in health and safety, it could have enacted uniform health and safety regulations. See *id.* Alternatively, if Smithtown's interest was in ensuring the financing that was necessary to build and maintain the incinerator, it could have issued municipal bonds or added a general tax to each household. See *id.* Because these options were available to Smithtown, the Second Circuit struck down the flow control ordinance under the dormant Commerce Clause. See *id.*

105. See *id.* at 506.

106. See *id.* at 515.

107. See *id.* at 515 (finding Smithtown market participant in waste collection and disposal because it chose not to use town employees and town equipment). The court based this part of its decision on *White v. Massachusetts Council of Construction Employers*, 460 U.S. 204 (1983). There, the Supreme Court held that an executive order issued by the Mayor of Boston requiring all publicly funded construction projects to be performed by a work force of at least fifty percent Boston residents was constitutional under the Commerce Clause. See *id.* at 205-06. The Supreme Court stated that "[i]nsofar as the city expended only its own funds in entering into [waste disposal] contracts for public projects, it [is] a market participant . . ." *Id.* at 214-15. In light of this holding, the Second Circuit in *SSC Corp.* concluded that if Smithtown could force SSC to hire fifty percent of its workforce from Smithtown, then there would be no reason why Smithtown could not also require SSC to use the town's incinerator. See *SSC Corp.*, 66 F.3d at 515. The court stated "[b]ecause the waste disposal services are 'substantially if informally' being provided to Smithtown, the town can decide with whom it will deal." *Id.*

108. *SSC Corp.*, 66 F.3d at 517. The Second Circuit reinforced this holding by pointing to the potential liability Smithtown would face under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). See *id.* at 516. If Smithtown was unable to mandate a location for its waste disposal as a "market participant," it would be unable to prevent CERCLA liability. See *id.* This result would be inconsistent with the aims of Congress because CERCLA was in-

Smithtown to be a "market participant", the Second Circuit held that the contract was "free from the strictures of the Commerce Clause."¹⁰⁹

3. "Open and Competitive" Bidding Process Analysis

The Third Circuit Court of Appeals took a different approach to flow control ordinances in *Harvey & Harvey v. County of Chester*.¹¹⁰ In *Harvey*, the Third Circuit analyzed the Pennsylvania Municipal Waste Act ("Act").¹¹¹ The Act required each county to submit a plan for the long-term processing and disposal of its waste.¹¹²

tended to "encourage 'arrangers' of waste disposal to select environmentally secure disposal sites . . ." *Id.* Accordingly, Congress intended to allow towns to have a voice in the selection of waste disposal sites. *See id.* For a further discussion of CERCLA liability, see *infra* notes 203-05 and accompanying text.

109. *Id.* at 506.

110. 68 F.3d 788 (3d Cir. 1995).

111. *See id.* at 793. The goal of the Pennsylvania Municipal Waste Act (the "Waste Act") is to "protect the public health, safety, and welfare from the short- and long-term dangers of the transportation, processing, treatment, storage and disposal of municipal waste." *Id.* (citing Waste Act, 53 P.S. § 4000.102(b)(3)). The Waste Act authorizes each county to establish a flow control ordinance. *See id.* The policy goal of these flow control ordinances is stated in § 102(a)(10) of the Waste Act. *See id.* It states:

Authoring counties to control the flow of municipal waste is necessary, among other reasons, to guarantee the long-term economic viability of resource recovery facilities and municipal waste landfills, to ensure that such facilities and landfills can be financed, to moderate the cost of such facilities and landfills over the long term, to protect existing capacity and to assist in the development of markets for recyclable materials by guaranteeing a steady flow of such materials.

53 P.S. § 4000.102(a)(10). Provisions of the Waste Act state that each flow control ordinance may designate a certain waste facility for a period of ten years. *See Harvey*, 68 F.3d at 793. (citing Waste Act, 53 P.S. § 4000.303(e)). There is no requirement that the facility be within each county. *See id.* However, a local facility is required to be given first choice as to the disposal and processing of locally generated waste. *See id.* (citing Waste Act, 53 P.S. § 4000.106(6)). Furthermore, alternative programs and facilities must be considered and any selection must be made through an open and competitive process. *See id.* (citing Waste Act, 53 P.S. § 4000.502(f)(2)). Alternatively, if a town decides to enter the waste market, either through direct ownership or operation, then it must set forth an explanation for its decision, "giving consideration to the comprehensive costs and benefits of private ownership and operation of such facilities." *Id.* (citing Waste Act, 53 P.S. § 4000.502(m)).

112. *See Harvey*, 68 F.3d at 793. Each waste management plan is to be reviewed during its preparation by a county advisory committee, which consists of representatives of industry, civic groups, and the county's municipalities. *See id.* The purpose of the county advisory committee is make proposals as to changes to the plan it deems appropriate. *See id.* (citing Waste Act, 53 P.S. § 4000.503(a)). The proposed plan must also be submitted to a county advisory committee at least thirty days before it is submitted to the DER. *See id.* (citing Waste Act, 53 P.S. § 4000.503(d)). A county must also make the proposed plan available to the public for review and comment for a period of ninety days and hold at least one public hearing on it. *See id.* (citing Waste Act, 53 P.S. § 4000.503(c)). Once adopted by the county, the plan

Chester County submitted its proposal but the Department of Environmental Resources (DER) informed the county that it must control its flow of waste before DER would approve the proposal.¹¹³ Accordingly, Chester County enacted a flow control ordinance that divided the county into two service areas and required the waste generated by each service area to be disposed of at a county-designated facility.¹¹⁴ The ordinance allowed other sites, including out-of-state facilities, to apply to become a designated facility.¹¹⁵ However, an agreement between Chester County and the Chester County Solid Waste Authority ("Authority") provided that "the County will oppose the construction, acquisition, operation or designation of any facility that might divert revenue from Lanchester."¹¹⁶

Plaintiff, Harvey & Harvey, a Delaware corporation operating as an interstate collector, hauler, and processor of municipal solid waste, sought a preliminary injunction in the United States District Court for the Eastern District of Pennsylvania, alleging that the Chester County ordinance violated the Commerce Clause of the

must be ratified by "fifty percent of the municipalities in the county, representing at least fifty percent of the population." *Id.* (citing Waste Act, 53 P.S. § 4000.503(d); 504(c)). Once done, the plan is then given to the DER for approval. *See id.* Persons who object are given the right to appeal the decision to the Pennsylvania Environmental Hearing Board. *See id.* The plan, upon final approval, may be revised at any time "but must be revised at least three years prior to the time that the remaining capacity for a county is exhausted." *Id.* (citing 25 Pa. Code § 272.251(b); 25 Pa. Code § 272.251(a)(1)). Furthermore, if a county uses an ordinance as opposed to a contract to mandate where waste will be disposed of or processed, then the county must explain its rationale for doing so and attach a copy of the proposed ordinance. *See id.* (citing Waste Act, 53 P.S. § 4000.502(1)).

113. *See id.* at 794. Chester County's proposed plan was a revision of a waste management plan that was passed in 1990. *See id.* That plan "designat[ed] the Southeastern Chester County Refuse Authority Sanitary Landfill (the "SECCRA Landfill") and the Chester County Solid Waste Authority Lanchester Sanitary Landfill (the "Lanchester Landfill") as the primary disposal sites for the County." *Id.* Chester County chose to revise the plan due to concerns over possible adverse affects on the "northern tier" of Chester County due to the exclusive designation of the SECCRA and Lanchester landfills. *See id.* Chester's county advisory committee recommended that a private Montgomery County landfill (the "Pottstown Landfill") be included as a disposal option. *See id.*

114. *See id.* at 794-5. Even though DER refused to approve the plan until a flow control ordinance was enacted, nothing in Chester's original waste management plan mandated the adoption of flow control. Here, however, Chester chose to abide by DER's recommendation and allocated the SECCRA Landfill and the Lanchester Landfill as the two service areas. *See id.* However, the Pottstown Landfill was allowed to receive a certain portion of Chester County's waste. *See id.* at 795.

115. *See id.*

116. *Id.*

United States Constitution.¹¹⁷ Harvey & Harvey argued that the ordinance discriminated against the interstate solid waste market by prohibiting both the export of the county's solid waste to alternative sites and states and the import of out-of-state waste processing and disposal services.¹¹⁸ The Third Circuit disagreed with Harvey & Harvey.¹¹⁹ The court asserted that simply because the county's site happened to be in-state, that alone did not establish that Chester County's regulation discriminated against interstate commerce.¹²⁰

The court then departed from *Carbone's* discriminatory effect analysis and focused on the selection process for waste service providers.¹²¹ The court distinguished the ordinance in *Carbone* by stating that there was no provision allowing the addition of other sites, nor was there a time limit for the designated facilities.¹²²

The Third Circuit then set forth the following factors a court should consider when determining if out-of-state bidders were deprived access to the local market: "(1) the designation process; (2) the duration of the designation; and (3) the likelihood of an amendment to add alternative sites."¹²³ Therefore, a local government may rebut a discrimination claim and avoid Commerce Clause scrutiny by making a clear showing that the "designation process was open, fair, and competitive" and that it was "determined by objective criteria which do not have the effect of favoring in-state interests."¹²⁴ However, the Third Circuit added that even if

117. See *Harvey*, 68 F.3d at 794-95. Harvey wanted the preliminary injunction to enjoin the relevant regulations of the ordinance from being enforced. See *id.* at 795. The district court denied the preliminary injunction, citing that Harvey had not made a sufficient showing of immediate and irreparable harm. See *id.* The district court consequently set a trial date for September 12, 1994. See *id.*

118. See *id.* at 795.

119. *Id.* at 801.

120. See *id.* The court then set forth three factors which need to be examined in determining whether a flow control ordinance discriminates against interstate commerce. See *id.* For a list of these factors, see text accompanying *infra* notes 123.

121. See *id.* at 802 (stating that "a flow control ordinance requires all waste to be processed or deposited in state for some period of time, therefore, does not necessarily violate the dormant Commerce Clause unless out-of-state businesses did not compete on an even playing field for the designation").

122. See *Harvey*, 68 F.3d at 800 (stating that "the town's likely ownership of the transfer station after five years seems to render the station's monopoly permanent"); Maryellen Suhrhoff, *Comment: Solid Waste Flow Control and the Commerce Clause: Circumventing Carbone*, 7 ALB. L.J. SCI. & TECH. 186, 195 (1996) (commenting that *Harvey* court noted the facility in *Carbone* had a long-term monopoly).

123. *Harvey*, 68 F.3d at 801.

124. *Id.* at 803. The Third Circuit noted that evidence of an open and competitive bidding process might include the following:

bid solicitation, selection criteria, evaluation of bidders, *et alia*, but such evidence alone may be insufficient to prove the flow control scheme's neutrality. The government defendants in these cases might also present

a local municipality demonstrates that it has an open and fair bidding process, the party challenging the ordinance may still use the *Pike* balancing test to prove that "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."¹²⁵

The Third Circuit ultimately concluded that Chester County's designation process appeared to be biased in favor of local interests and against interstate commerce.¹²⁶ However, since the lower court was unable to utilize the Third Circuit's clarifications on this issue, the case was remanded back to the district court.¹²⁷

IV. NARRATIVE ANALYSIS

The question before the First Circuit Court of Appeals in *Houlton* was whether the 1997 Ordinance was discriminatory in its effect on interstate commerce in violation of the dormant Commerce Clause.¹²⁸ The First Circuit reviewed the U.S. Supreme Court's analysis in *Carbone*, the Second Circuit's holding in *Smithtown*, and the Third Circuit's decision in *Harvey* and drew applicable law from each.¹²⁹ The Court then addressed the District Court holding.¹³⁰ The District Court had rejected Houlton Citizens' Coalition's (HCC)'s argument that the 1997 Ordinance and contract with Andino were discriminatory against out-of-state businesses and therefore were unconstitutional.¹³¹ Instead, the District Court accepted the Town's argument that it acted as a "market participant"

additional evidence, such as statistical evidence or expert testimony, demonstrating that different aspects of the designation process are as neutral to out-of-state interests in practice as they appear on their face.

Id.

125. *Id.* (citing *Pike v. Bruce Church, Inc.* 397 U.S. 137, 142 (1970)).

126. *See id.* at 807. The Third Circuit believed that the Lancaster, SECCRA and Pottstown facilities were favored over other sites. *See id.*

127. *See id.*

128. *See Houlton Citizens Coalition v. Town of Houlton*, 175 F.3d 178, 187 (1st Cir. 1999). For an overview of the 1997 Ordinance, see *supra* text accompanying notes 36-41.

129. *See id.* at 184-87. For a discussion of the facts and holding of *Carbone*, see *supra* notes 75-86 and accompanying text. For a discussion of the facts and holding of *Smithtown*, see *supra* notes 94-109 and accompanying text. For a discussion of the facts and holding of *Harvey*, see *supra* notes 110-127 and accompanying text.

130. *See id.* at 187.

131. *See id.* HCC argued that the 1997 Ordinance and contract was similar to the Clarkstown's ordinance in *Carbone* since they both forced waste to be passed through a single contractor thereby denying "out-of-state businesses of access to a local market." *Id.* quoting *Clarkstown*, 511 U.S. at 389.

and that Commerce Clause scrutiny did not apply.¹³² The First Circuit, however, rejected the Town's argument and found that the Town was not a "market participant."¹³³

The First Circuit stated that it was reluctant to rely on the Second Circuit's "market participant" dormant Commerce Clause analysis in *Smithtown* for two reasons.¹³⁴ First, the court asserted that *Smithtown* was a novel decision whose *ratio decidendi* had yet to be adopted by the Supreme Court.¹³⁵ Second, the Court distinguished *Smithtown* on the fact that the Town's 1997 ordinance created forced business transactions that *Smithtown*'s ordinance did not.¹³⁶ The 1997 Ordinance required self haulers to use the designated transfer station, and it required those who chose not to self-haul to contract individually with Andino to remove their waste.¹³⁷

Instead of relying on the lower court's reasoning, the First Circuit affirmed the decision on other grounds. The Court addressed the principles behind the dormant Commerce Clause and stated that the prevention of economic balkanization is at the core of the doctrine.¹³⁸ Therefore "if local legislation leaves all comers with equal access to the local market, it does not offend the dormant

132. See *id.* The Town argued that the 1997 Ordinance allowed them to become the sole buyer of local garbage and, like *Smithtown*, was acting as a market participant when it contracted with Andino. See *id.* The district court judge accepted the Town's argument and after applying the *Pike* balancing test declared the 1997 Ordinance constitutional. See *id.* The court also addressed The Town's contract with Andino and concluded that "Houlton is acting as a 'buyer' in the garbage collection, disposal, and processing markets, and enters those markets 'with the same freedoms and subject to the same restrictions as a private party'" and is therefore not subject to the Commerce Clause. *Id.*; *Houlton Citizens' Coalition v. Town of Houlton*, 982 F.Supp. 40, 44 (D. Me. 1997).

133. See *Houlton*, 175 F.3d at 187-88.

134. See *id.* at 187-88.

135. See *id.*

136. See *id.* at 188. In *Smithtown*, forced business transactions were avoided by the appropriation of public tax dollars to pay for waste disposal. See *id.* The First Circuit noted that this distinction could not be disregarded, stating that the Second Circuit relied upon this information in its market participation analysis. See *id.*

137. See *id.*

138. See *id.* (noting that "[t]he core purpose of the dormant Commerce Clause is to prevent states and their political subdivisions from promulgating protectionist policies"); see also *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980) (noting that state operating in private market "may not evade the constitutional policy against economic Balkanization"); *Hughes v. Oklahoma*, 411 U.S. 322, 325-26 (1979) (noting that avoiding economic balkanization was central concern of Framers of Constitution when they drafted Commerce Clause); *Freeman v. Hewit*, 329 U.S. 249, 276 (1946) (stating Commerce Clause "preclude[s] [a State] from taking any action which may fairly be deemed to have the effect of impeding the free flow of trade between States"); *Baldwin v. Seelig*, 294 U.S. 511, 527 (1935) (asserting that "what is ultimate is the principle that one state in its dealing with another may not place itself in a position of economic isolation").

Commerce Clause.”¹³⁹ The court reasoned that no Commerce Clause violation occurs if both in-state and out-of-state interests are allowed unrestricted access to a municipality’s bidding process and the municipality awards its contract to the lowest bidder.¹⁴⁰ This, the court said, is because in-state interests are not given preferential treatment and out-of-state interests are not subject to discrimination.¹⁴¹

The First Circuit applied these principles to the 1997 Ordinance and found no violation of the dormant Commerce Clause.¹⁴² The Town had argued that it had a bidding process that was open to all prospective bidders, both in-state and out-of-state.¹⁴³ The record indicated no signs that the Town’s decision was slanted in any way to favor in-state interests even though Andino, a local firm and low bidder, was awarded the contract.¹⁴⁴ Because the court found an even playing field, it held that the Town’s garbage disposal ordinance did not *per se* violate the dormant Commerce Clause.¹⁴⁵

The First Circuit completed its analysis by applying the balancing test set forth in *Pike v. Bruce Church, Inc.*¹⁴⁶ The court concluded that the 1997 Ordinance placed virtually no burden on interstate commerce, and it found a “strong local interest in efficient and effective waste management.”¹⁴⁷ After comparing the two interests,

139. *Houlton*, 175 F.3d at 188.

140. *See id.* at 188-89. (stating, “to the extent that in-state and out-of-state bidders are allowed to compete freely on a level playing field, there is no cause for constitutional concern”).

141. *See id.* at 188.

142. *See id.*

143. *See id.* at 189. The Town held an open meeting where any prospective bidders were allowed to comment and ask questions about the project. *See id.* The Town then issued a request for proposals (RFP) which the court found placed no additional restrictions or burdens on non-local interests. *See id.* The 1997 Ordinance did not require the bidder to haul waste to a site chosen by the Town, but instead the bidder was allowed to choose any site they wanted. *See id.*

144. *See Houlton*, 175 F.3d at 189. Andino’s contract with the Town was for a term of seven years. *See id.* The First Circuit was not alarmed by this lengthy amount of time, stating that the duration effected both in-state and out-of-state interests the same and it did not “seem excessive considering the relatively substantial commitment of equipment and other resources required on the successful bidder’s part.” *Id.*

145. *See id.* at 189 (stating that “garbage disposal scheme [did] not constitute a *per se* violation of the dormant Commerce Clause, but instead regulates commerce evenhandedly, with no more than incidental effects on interstate trade”).

146. 397 U.S. 137 (1970). For a discussion of the balancing test set forth in *Pike*, see *supra* notes 63-68 and accompanying text.

147. *Houlton*, 175 F.3d at 189.

the court concluded that "Houlton pass[ed] [the] test with flying colors."¹⁴⁸

V. CRITICAL ANALYSIS

The First Circuit's holding in *Houlton* is subject to scrutiny for two reasons. First, the court's reliance on the Third Circuit's open-and-competitive bidding test in *Harvey* may be misplaced.¹⁴⁹ Second, the court ignored the problems self-haulers face because of the 1997 Ordinance.¹⁵⁰

A. A Shift Away From *Carbone* And Toward *Harvey*

In reaching its holding, the First Circuit shifted away from the traditional dormant Commerce Clause analysis set forth in *Carbone*.¹⁵¹ *Carbone* held that "a flow control ordinance coupled with a designation discriminated in its effect" by allowing the chosen waste company to be the sole provider of waste services within the town.¹⁵² As such, out-of-state waste service providers were denied access to the initial processing step.¹⁵³ In *Houlton*, the 1997 Ordinance accomplishes the same effect. Andino is the *only* waste company who is allowed to haul Houlton's waste. Therefore, without competition for waste hauling services, residents and businesses will be unable to take advantage of possibly cheaper hauling services. As Justice Kennedy wrote in *Carbone* "[t]hese economic effects are more than enough to bring the Clarkstown ordinance within the purview of the Commerce Clause."¹⁵⁴

The only distinguishing factor the *Houlton* court could have looked to was that both in-state and out-of-state processors had no access to Houlton's waste market.¹⁵⁵ The court's possible consideration of this factor would be misplaced, however, because this effect

148. *Id.*

149. For a discussion of the facts and holding in *Harvey*, see *supra* notes 110-127 and accompanying text.

150. For a discussion of self-haulers under the 1997 Ordinance, see *infra* notes 177-90 and accompanying text.

151. For a discussion of the traditional analysis set forth in *Carbone*, see *supra* text accompanying notes 55-68.

152. *Harvey & Harvey*, 68 F.3d 811, 810 (3d Cir. 1995) (Nygaard, J., dissenting); see also *C & A Carbone, Inc. v. Clarkstown*, 511 U.S. 383, 391 (1994) (stating, "the flow control ordinance discriminates, for it allows only the favored operator to process waste within the limits of the town").

153. See *Carbone*, 511 U.S. at 389.

154. *Id.*

155. See *Houlton*, 175 F.3d at 188-89. The First Circuit commented that an "open and competitive" bidding process left everyone on level ground and therefore no one party was impacted greater than another. See *id.* The court specifically

is not considered in a "dormant" Commerce Clause analysis.¹⁵⁶ The Supreme Court, in *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources*,¹⁵⁷ held that a state may not protect its own interests and avoid Commerce Clause analysis merely by asserting that in-state interests are equally effected.¹⁵⁸ Therefore, it is hard to understand why the First Circuit would abandon Supreme Court precedent in *Carbone* and resort to an adoption of the *Harvey* analysis.¹⁵⁹

Judge Nygaard's dissent sheds some light on what the *Houlton* court should have done.¹⁶⁰ Instead of focusing upon the selection process, he concentrated on the fact that the ordinance designated a particular facility as the sole waste facility for the town.¹⁶¹ The effect of the ordinance, according to Judge Nygaard, was to prevent out-of-state waste service providers from accepting waste or selling services because the ordinance mandated that a local facility be used.¹⁶² Judge Nygaard concluded that this facet of the ordinance was discriminatory in its effect and therefore deserved heightened scrutiny, stating that "[t]he outcome of the selection process, however open that process may be, can be discriminatory in its practical effect."¹⁶³ Since heightened scrutiny should have applied here, *Carbone's* holding mandated a showing that no other means existed to

stated that "[i]n such circumstances, unrestricted access to the bidding process constitutes unrestricted access to the relevant market." *Id.* at 189.

156. See *C & A Carbone, Inc. v. Clarkstown*, 511 U.S. 383, 391 (1994); see *Dean Milk Co. v. Madison*, 340 U.S. 349 (1950). The Supreme Court struck down the City of Madison's regulation that milk be pasteurized within five miles of the city if it was to be sold there. *Dean Milk*, 340 U.S. at 350. The Court noted that "[i]t is immaterial that Wisconsin milk from outside the Madison area is subjected to the same proscription as that moving in interstate commerce." *Id.* at 354, n.4.

157. 504 U.S. 353 (1992).

158. See *id.* at 361 (stating that "[o]ur prior cases teach that a State (or one of its political subdivisions) may not avoid the strictures of the Commerce Clause by curtailing the movement of articles of commerce through subdivisions of the State, rather than through the State itself").

159. For a discussion of *Carbone*, see *supra* notes 75-86 and accompanying text. For a discussion of *Harvey*, see *supra* notes 89-103 and accompanying text.

160. *Harvey & Harvey v. County of Chester*, 68 F.3d 788, 809-11 (3rd Cir. 1995).

161. See *id.* at 802. The majority opinion stated, "in interpreting *Carbone*, this Court has focused on the process of selecting waste service providers rather than on the effect of the regulation once a provider or providers have been chosen." *Id.* Judge Nygaard stated that courts must apply heightened scrutiny to these types of ordinances "because, regardless of the process employed in selecting waste service providers, the effect discriminates against interstate commerce." *Id.* at 810.

162. See *id.* at 810.

163. *Id.* Judge Nygaard asserted that the effect of the flow control ordinance alone is what should trigger heightened scrutiny. See *id.*

advance a legitimate local interest.¹⁶⁴ Applying this to *Harvey*, Judge Nygaard asserted that Chester County's ordinance would most likely fail if remanded because there were plausible alternatives to reaching its goals of effective waste removal.¹⁶⁵

Judge Nygaard's dissent sets forth a credible argument against the wisdom of the court's sole reliance on the selection process.¹⁶⁶ In most dormant Commerce Clause cases dealing with flow control ordinances, a municipality simply designates a site and forbids an open and competitive selection processes.¹⁶⁷ A municipality designates a site in an ordinance because the municipality either owns or has invested in it.¹⁶⁸ Courts have had little difficulty finding such ordinances *per se* unconstitutional.¹⁶⁹

In cases where the municipality does not designate a site, courts struggle to articulate a coherent approach for dormant Commerce Clause analysis.¹⁷⁰ The First Circuit in *Houlton* considers only

164. See *id.* at 810-11 (stating that "heightened scrutiny analysis dictates that '[d]iscrimination against interstate commerce in favor of local business or investment is *per se* invalid, save in a narrow class of cases in which the municipality can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest'") (quoting *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 392 (1994) (citing *Maine v. Taylor*, 477 U.S. 131 (1986))).

165. See *Harvey*, 68 F.3d at 810-11. Judge Nygaard wrote that because the flow control ordinance was discriminatory in its effect, heightened scrutiny must be applied. See *id.* He then went on to reject any claims of necessity, writing that there were alternative methods of achieving the town's goals. See *id.* Judge Nygaard wrote:

Although assurance of ten years of disposal capacity for county waste and of the proper disposal of waste generated in a county are laudable goals, the designation of the facilities under a flow control scheme may not be essential to achieving those goals. For example, the county might seek assurances of ten years of capacity from a few disposal facilities without then requiring all county generated waste actually to be disposed of at those same specific facilities.

Id. at 811.

166. For a discussion of Judge Nygaard's dissent in *Harvey*, see *supra* notes 160-65 and accompanying text.

167. See John Turner, *Article: The Flow Control of Solid Waste and the Commerce Clause: Carbone and Its Progeny*, 7 VILL. ENVTL. L.J. 203, 231 (1996) (stating that most post-*Carbone* decisions involve flow control ordinances which prohibit waste from being transported to any facility other than one designated by government instead of process used to select facility, since facility was assigned and not open to bids).

168. See Maryellen Suhrhoff, *Comment: Solid Waste Flow Control and the Commerce Clause: Circumventing Carbone*, 7 ALB. L.J. SCI. & TECH. 186, 196 (1997) (noting that "the Harvey argument is limited to situations where the government does not own, contract for or directly finance a facility"). For a discussion of *Harvey*, see *supra* notes 89-103 and accompanying text.

169. See Turner, *supra* note 158, at 231 (noting that post-*Carbone* cases strike down most ordinances because they act as export embargo and do not utilize competitive selection process).

170. See *id.* Courts, such as the Third Circuit in *Harvey*, have come to recognize that "the existence of a competitive bidding process, which often entails the selection of one or more private facilities or a mix of public and private sites,

whether the town's self-proclaimed "open and competitive" bidding process discriminated in favor of local business.¹⁷¹ If it finds the process discriminatory, then it holds that the ordinance violates the dormant Commerce Clause.¹⁷² Judge Nygaard, however, indicated in his *Harvey* dissent, an approach that focuses solely on the bidding process ignores discriminatory effects that may result after the selection process.¹⁷³

In *Houlton*, the practical effect of the Town's flow control ordinance and contract with Andino is to discriminate against both in-state and out-of-state waste companies.¹⁷⁴ The 1997 Ordinance currently denies both interests access to Houlton's waste disposal market by banning town residents under the penalty of criminal sanctions from using anyone other than Andino for their waste disposal needs.¹⁷⁵ It is this sort of protectionism which the dormant Commerce Clause was meant to prohibit.¹⁷⁶

B. First Circuit Overlooks Self-Haulers?

The *Houlton* court virtually ignored the self-hauler segment of Houlton's population when it concluded that the 1997 Ordinance was not in violation of the dormant Commerce Clause.¹⁷⁷ The 1997 Ordinance requires all self-haulers to transport their trash to a site designated by the Town Council.¹⁷⁸ Houlton residents who choose to defy the ordinance and dump elsewhere are subject to fines and

presents issues that do not exist when the local government simply compels waste haulers to utilize a public facility." *Id.* at 233 (citing *Harvey & Harvey*, 68 F.3d 788, 802 (3d Cir. 1995)).

171. For the facts of *Houlton*, see *supra* notes 31-46 and accompanying text. For a narrative analysis of *Houlton*, see *supra* notes 128-48 and accompanying text.

172. See *Harvey & Harvey v. County of Chester*, 68 F.3d 788, 806-07 (3d Cir. 1995). The Third Circuit asserted that Chester County's designation process was not as open and competitive as Chester County said it was. See *id.* The court remanded the case back to the district court to apply the open and competitive guidelines which it had developed. See *id.* at 807. For a discussion of these guidelines, see *supra* text accompanying notes 123-25.

173. See *Turner*, *supra* note 141, at 232 (stating that "it is the designation of a single, in-state landfill, rather than the process by which it was designated, that has resulted in the discrimination against interstate commerce"). For a discussion of Judge Nygaard's dissent in *Harvey*, see *supra* notes 160-65 and accompanying text.

174. For a discussion of the 1997 Ordinance, see *supra* notes 36-41 and accompanying text.

175. For a discussion of the 1997 Ordinance, see *supra* notes 36-41 and accompanying text.

176. See *Houlton*, 175 F.3d at 188. For a list of cases which emphasize this point, see *supra* note 138.

177. See *id.* at 189.

178. See *id.* at 181.

penalties.¹⁷⁹ A possible explanation for the court's overlooking of self-haulers is the likelihood that this segment of the waste disposal market is so minute as to not warrant consideration. However, in *New Energy Co. of Indiana v. Limbach*,¹⁸⁰ the Supreme Court held that the size and numbers of effected parties should not be considered where the discrimination is patent.¹⁸¹ The Court reasoned that considering the size of those effected would lead to more uncertainty in what was already a complex field of law.¹⁸²

By denying self-haulers the right to choose waste disposal sites, Houlton is effecting interstate and *intrastate* commerce by preventing out-of-state and in-state interests access to this section of Houlton's economy. Self-haulers are not allowed to dispose of their waste at alternate sites because the 1997 Ordinance forces them to do business exclusively with Andino.¹⁸³ Again, an argument that local interests were also excluded would have been immaterial to the First Circuit because of the Supreme Court's holding in *Dean Milk*, holding unconstitutional ordinances that discriminate equally against in-state and out-of-state interests.¹⁸⁴ The result of this ordinance on self-haulers therefore is to deny them the opportunity to contract out with another waste disposal firm. Consequently, both the interstate and *intrastate* market for waste disposal is impeded.

179. *See id.*

180. 486 U.S. 269 (1988).

181. *See id.* Appellant, New Energy Company of Indiana, filed suit to challenge the constitutionality of an Ohio revenue provision that "awards a tax credit against the Ohio motor vehicle fuel sales tax for each gallon of ethanol sold (as a component of gasohol) by fuel dealers, but only if the ethanol is produced in Ohio or in a State that grants similar tax advantages to ethanol produced in Ohio." *Id.* at 271. New Energy Company manufactured ethanol in Indiana, a state which had repealed its tax exemption for ethanol. *See id.* at 272. Consequently, because of Ohio's reciprocity provision, New Energy Company was ineligible to receive the Ohio tax credits. *See id.* at 272-73. Appellees argued that the provision should not be considered burdensome to interstate commerce because its practical scope was limited. *See id.* 276. Appellees pointed out that there was only one ethanol manufacturer in Ohio and the only out-of-state manufacturer that was burdened was New Energy Company. *See id.* The Supreme Court disagreed, stating that "[o]ur cases, however, indicate that where discrimination is patent, as it is here, neither a widespread disadvantage to in-state interests nor a widespread disadvantage to out-of-state competitors need be shown." *Id.*

182. *See id.* at 276-77 (stating that "[v]arying the strength of the bar against economic protectionism according to the size and number of in-state and out-of-state firms affected would serve no purpose except the creation of new uncertainties in an already complex field").

183. *See Houlton*, 175 F.3d at 188 (stating that "even self-haulers are required to use a designated transfer station" therefore creating forced business transactions). For an overview of the 1997 Ordinance, see *supra* notes 36-41 and accompanying text.

184. *See C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 391 (1994); *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1950).

In *Carbone*, this economic effect was enough to receive Commerce Clause coverage.¹⁸⁵ The Court held that “[i]t is well settled that actions are within the domain of the Commerce Clause if they burden interstate commerce or impede its free flow.”¹⁸⁶

Moreover, under a “market participation” analysis, the 1997 Ordinance violates the dormant Commerce Clause.¹⁸⁷ Houlton would not qualify as a “market participant” because the 1997 Ordinance imposes fines and penalties against Houlton’s non-compliant self-haulers.¹⁸⁸ These criminal sanctions imposed by the Town are ones that a private party could not undertake on its own.¹⁸⁹ This characteristic is a requirement for classification as a “market participant” and, consequently, Houlton would be classified as a “market regulator.”¹⁹⁰ Therefore, the First Circuit’s decision in *Houlton* may be subject to criticism for the discriminatory effect it has on this small portion of Houlton’s economy.

VI. IMPACT

The First Circuit’s decision in *Houlton* may have a substantial impact upon the judicial landscape. First, district courts may now use *Houlton* as precedent in analyzing future dormant Commerce Clause analysis. This will limit the discretion lower district courts employ when addressing a dormant Commerce Clause issue. Traditional dormant Commerce Clause analysis requires a court to first ask the question of whether or not the flow control ordinance was discriminatory in purpose or effect.¹⁹¹ If the answer is yes, then the flow control ordinance will be stricken down as unconstitutional.¹⁹² If the answer is no, then the *Pike* balancing test will be applied.¹⁹³ After *Houlton*, however, district courts and other circuit courts who adopt *Houlton*’s line of reasoning will begin their dormant Commerce Clause analysis with the question of whether or not the

185. See *Carbone*, 511 U.S. at 389.

186. *Id.*

187. For a discussion of the “market participation” analysis, see *supra* text accompanying notes 187-93.

188. See *id.*; see also *Houlton*, 175 F.3d at 182.

189. See *SSC Corp. v. Town of Smithtown*, 66 F.3d 502, 510 (1992); *Wyoming v. Oklahoma*, 502 U.S. 437 (1992).

190. See *SSC Corp.*, 66 F.3d at 510.

191. For a discussion of the traditional dormant Commerce Clause analysis, see *supra* text accompanying notes 55-68.

192. See generally *C & A Carbone*, 511 U.S. 383 (1994); *Fort Gratiot Sanitary v. Michigan Dep’t of Natural Resources*, 504 U.S. 353 (1992); *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978).

193. For a discussion of the *Pike* balancing text, see *supra* text accompanying notes 63-65.

town's bidding process was "open and competitive," thereby avoiding Supreme Court precedent altogether.¹⁹⁴ This novel approach could lead to more confusion in this area of constitutional law because courts disagreeing with *Carbone's* strict scrutiny analysis could bypass it by adopting *Houlton's* line of reasoning. As such, when a dormant Commerce Clause issue arises in federal court, a split of authority may result.

As a practical result of *Houlton*, a town council trying to characterize its flow control ordinance as constitutional under the dormant Commerce Clause must be aware that *Houlton's* holding is applicable to the narrow set of cases where an open and competitive bidding process, not the ordinance, assigns the disposal site.¹⁹⁵ Consequently, if a town's ordinance mandates a disposal site but does not allow for outside bids, most courts will be unable to utilize the *Houlton* rationale to uphold the ordinance.¹⁹⁶

However, if a court finds the town's selection process open and competitive, a court can use the *Houlton* reasoning to uphold the ordinance, thus positively affecting a community. Politically, the *Houlton* decision helps eliminate confusion by instructing local politicians on how to draft effective flow control legislation.¹⁹⁷ As long as the proposed flow control ordinance has provisions that allow for an "open and competitive" bidding process, a court relying on *Houlton* will likely not overturn the ordinance in the future.¹⁹⁸ Local governments, as a result, will be less hesitant and more inclined to go forth with new plans for waste removal and processing.¹⁹⁹ Economically, *Houlton* will alleviate a town's concern about unfulfilled

194. For a discussion of the "open and competitive" bidding process, see *supra* notes 121-25 and accompanying text.

195. For a discussion of the distinction between post-*Carbone* cases in which ordinances have been deemed *per se* unconstitutional because of a designated disposal site in the local ordinance and those cases where there has been an open and competitive selection process, see *supra* text accompanying notes 167-73.

196. See John Turner, *Article: The Flow Control of Solid Waste and the Commerce Clause: Carbone and Its Progeny*, 7 VILL. ENVTL. L.J. 203, 231 (1996) (noting most post-*Carbone* cases have involved mandated facility sites without any selection process and therefore courts will rule ordinance *per se* invalid under dormant Commerce Clause).

197. For a discussion of the rationale used in *Houlton* to uphold a flow control ordinance, see *supra* text accompanying notes 138-41.

198. For a discussion of the "open and competitive" bidding process, see *supra* notes 121-25 and accompanying text.

199. See Eric S. Petersen & David N. Abramovitz, *Municipal Solid Waste Flow Control in the Post-Carbone World*, 22 FORDHAM URB. L.J. 361, 390 (1995) (asserting local governments were unlikely to expand waste disposal systems until they are confident flow control ordinances are lawful).

waste quotas.²⁰⁰ Local program's that survive *Houlton* analysis can now guarantee for the municipality the crucial supply of waste their projects require.²⁰¹ As such, the fear of defaulting on debt payments is reduced dramatically.²⁰² Furthermore, local politician's can limit their economic liability from environmental suits brought under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).²⁰³ CERCLA imposes strict liability on owners and operators of sites that have been effected by hazardous waste "regardless of whether it can be shown that the municipality's waste actually contained hazardous substances and regardless of whether the municipality had determined the disposal site."²⁰⁴ Therefore, since *Houlton* allows flow control legislation that directs a chosen operator to the town-owned waste site, the town can be in a better position to screen out potentially hazardous waste, thereby avoiding environmental and legal claims down the road.²⁰⁵

A self-hauler under a flow control ordinance similar to that in *Houlton's* may be adversely affected. A self-hauler will have no choice as to who processes their waste because the ordinance imposes criminal sanctions for failure to comply.²⁰⁶ Therefore, the further existence of self-haulers under a *Houlton*-type ordinance is questionable. Without a choice of disposal sites, a self-hauler won't be able to shop around for better disposal rates.²⁰⁷ Therefore, there

200. For a discussion of the relationship between waste quotas and governmental interests, see *supra* notes 17-25 and accompanying text. See also Wolf, *supra* note 1, at 537 (asserting that flow control legislation guarantees sufficient income "to enable paying off the bonds necessary to finance the facility").

201. See Wolf, *supra* note 1, at 537-38 (contending that bonds needed to finance construction of waste disposal facilities are almost impossible to obtain without guaranteeing stable source of revenue).

202. See *id.* at 538-39 (stating that "[i]t is obvious that assuring the financial viability of waste facilities is the foremost objective sought by the users of flow control"); see also Wolf, *supra* note 13, at 268 (contending that flow control ordinances make waste facilities attractive investments by "wipe[ing] out the risk and virtually assur[ing] repayment").

203. See CERCLA, Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified as amended at 42 U.S.C. §§ 9601-75 (1994)).

204. See Petersen & Abramovitz, *supra* note 184, at 368-69. CERCLA imposes substantial liability on owners, operators, arrangers and transporters of hazardous substances. See *id.* at 368. CERCLA provides for "liability, compensation, cleanup, and emergency response for hazardous substances released into the environment and the cleanup of inactive hazardous waste disposal sites." CERCLA, §§?; 42 U.S.C. § ??.

205. See Petersen and Abramovitz, *supra* note 183, at 367-69. Flow control allows governments to "protect the public and [avoid] substantial financial liability." *Id.* at 369.

206. See *Houlton*, 175 F.3d at 182.

207. See Wolf, *supra* note 13, at 269 (stating that "[a]ll other things being equal, people ordinarily seek the lowest price for a product").

is little benefit for a self-hauler to go through the time and expense of self-hauling to X's site when X could come and dispose of it instead. Either way, the final resting place of a self-hauler's waste will still be at the town's chosen facility.

Finally, the non-exclusive waste haulers or processors suffer the worst after *Houlton*. If a town successfully proves to a court that its selection process is open and competitive, processors and haulers lose access to that market for the duration of the contract.²⁰⁸ Their only option is to wait until the next open bid and hope that they are the lowest bidder. As a result, processors and haulers may lose revenue because they will have a decreased market share.²⁰⁹

VII. CONCLUSION

For these reasons, the *Houlton* court's rationale is too narrowly focused. A flow control ordinance contains more than the selection process. The first step in any traditional dormant Commerce Clause analysis is to determine whether the ordinance is discriminatory in its purpose or in its effect.²¹⁰ In *Houlton*, the First Circuit ignored the 1997 Ordinance's effect on interstate commerce. By doing so, it bypassed dormant Commerce Clause analysis altogether. Whether the United States Supreme Court will find this line of reasoning convincing in the future is open to debate.

Even if the United States Supreme Court does not find *Houlton* convincing, *Houlton's* value may lie in its political message rather than as a judicial mandate. The First Circuit may be alerting Congress that not every flow control ordinance that happens to have some discriminatory effect on interstate commerce is *per se* unconstitutional. In so doing, the court is inviting Congress to provide municipalities the legislative tools to accomplish such schemes. The First Circuit may have been influenced by Justice O'Connor's concurrence in *Carbone* in support of this view.²¹¹ There, Justice O'Connor suggested that waste regulation problems could be

208. See *Harvey & Harvey, Inc. v. County of Chester*, 68 F.3d 788, 809 (3d Cir. 1995). The Third Circuit held that a contract of 10 years in length was not unreasonable given the construction and operation costs of waste facilities. See *id.* at n.19.

209. See *id.* at 275. Waste control and disposal is a \$63 billion dollar-a-year industry. See *id.* As such, this industry opposes flow control ordinances because they prevent or exclude companies from using alternative facilities that may be cheaper. See *id.*

210. For a discussion of the traditional dormant Commerce Clause analysis, see *supra* text accompanying notes 55-68.

211. See *C & A Carbone, Inc. v. Clarkstown*, 511 U.S. 383, 401-10 (1994).

solved by direct Congressional involvement.²¹² Congress has the power to regulate interstate commerce, of which waste control is included, under the Commerce Clause.²¹³ However, as of the 105th Congress, no such specific regulations have been passed.²¹⁴ Consequently, until Congress can agree on this issue, many of America's growing waste disposal problems may never be solved.

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212. See *id.* (stating that "[i]t is within Congress' power to authorize local imposition of flow control. Should Congress revisit this area, and enact legislation providing a clear indication that it intends States and localities to implement flow control, we will, of course, defer to legislative judgement").

213. See U.S. CONST. art. I, §8, cl. 3. For a discussion of Congress' power under the Commerce Clause, see *supra* notes 47-54 and accompanying text; see also Rachel D. Baker, Comment, *C & A Carbone v. Clarkstown: A Wake-Up Call for the Dormant Commerce Clause*, 5 DUKE ENV. L. & POL'Y F 67, 89 (1995) (stating that "Congress may solve this problem, however, by quickly enacting specific legislation authorizing localities to implement flow control ordinances").

214. See James E. McCarthy, *Solid Waste Issue in the 105th Congress* (visited Feb. 11, 2000) <http://www.cnle.org/nle/waste-16.html#_1_1>. McCarthy states: Despite many common features in the interstate waste bills, there have been some key differences in the House and Senate approaches to such legislation. These differences, combined with the conflicting interests of state and local governments and the opposition of some elements of the waste management industry, have kept Congress from reaching agreement.

Id.